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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-353

HOWARD PIPER, THOMAS F. PIPER
and WILLIAM T. PIPER, JR.,
Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC., et al.,
Respondents.

REPLY BRIEF FOR PETITIONERS HOWARD PIPER, THOMAS F. PIPER AND WILLIAM T. PIPER, JR. TO THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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The Piper individuals respectfully submit this reply to the brief submitted by the United States Securities and Exchange Commission ("SEC") as *amicus curiae*.

The *amicus* brief concludes that this Court should not review the questions presented by the three petitions for certiorari although it acknowledges that many questions presented are important ones. While disagreeing with the rulings of the court below in several vital particulars, the brief suggests that this Court not review them at this time. In so doing, the brief ignores the cumulative effect of each of the admittedly erroneous determinations. If left undisturbed, those determinations will have far reaching

ramifications for the courts and the business community, particularly in light of the present volume of takeover bids.

We are constrained to submit this reply brief in order to refocus the Court's attention on the important issues raised in the Piper individuals' petition for certiorari since the *amicus* brief either distorts or ignores them.

Causation

The *amicus* brief concedes that the decisions below did not find that the Piper individuals caused injury to Chris-Craft. Thus, it acknowledges the complete absence of findings of causation in fact. In place of such findings the *amicus* brief acknowledges that the decision below held that "where a contestant for control has been defeated in a contest in which its opponent and others committed such violations [of Section 14(e)], and the margin of victory was small, *injury could be presumed*" (*Amicus* Brief, p. 11; emphasis added). It is the propriety of indulging in such a presumption that we submit warrants review by this Court.

The *amicus* brief attempts to avoid the causation problem by substituting standing to sue. It asserts that granting standing to sue to a defeated contestant for control is consistent with the legislative purpose of Section 14(e). Since the purchaser-seller limitation of Rule 10b-5 is not present in Section 14(e), it attempts to distinguish the policy considerations of *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723. There, this Court denied standing because of the potential for vexatious litigation by plaintiffs whose alleged damages would be entirely speculative. The *amicus* brief argues that a contestant for corporate control who risks capital in obtaining shares of the target company is for unexplained reasons not in that position and should have a remedy at law for injury caused by a competitor's violations of the securities laws (*Amicus* Brief, p. 17). That position, however, serves to highlight the problem illustrated by the basis upon which the court below found the Piper individuals liable to pay over $36 million in "damages."

Their liability was premised solely on the alleged inability of Chris-Craft to purchase additional shares on its cash tender offer in January 1969 (although Chris-Craft was tendered more shares than it had sought). That shareholders did not tender their shares to Chris-Craft for reasons unrelated to the alleged misrepresentations is ignored. That the Piper shareholders who did not tender to Chris-Craft on its $65 offer were subsequently offered from $70 to $80 a share is ignored. That the court below specifically found that nothing the Piper individuals did after January 29 caused injury to Chris-Craft is also ignored.* Hence, by giving Chris-Craft a cause of action and then giving it the benefit of the presumption that it was denied the opportunity to purchase an unspecified number of shares in January, the court below dispensed entirely with proof that the January events caused injury in September when Bangor Punta acquired control. The *amicus* brief does not deny that this anomalous result is worthy of review by this Court; it merely overlooks the issue.

Joint and Several Liability

The *amicus* brief declines to address the question of joint and several liability, asserting that the question turns

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* Although the *amicus* brief refers to letters sent by Piper to its shareholders on June 4, June 20 and July 25, which did not mention an additional consideration possibility, the court below specifically found that those letters caused no injury to Chris-Craft (A-63). Indeed, even Chris-Craft conceded that the additional consideration provisions were fully described in Bangor Punta's preliminary registration statement in May and its final prospectus in July, both of which had been cleared by the SEC with full knowledge of the facts (426A, 428A-430A).

largely upon particular factual circumstances and the application of "well established principles of securities and tort law" (*Amicus* Brief, p. 2). As we pointed out in our original petition (pp. 15-18) and our reply to Chris-Craft's brief (pp. 4-5), those principles militate against such liability. At most, the situation involves successive tortfeasors whose respective liability to Chris-Craft must be limited to such damages as were caused by their acts.

The result of the position taken by the court below is to give defeated contestants in tender offers a potent weapon to silence management. If the purpose of Section 14(e) is to ensure both "openness and truthfulness" and "fairness and equality of opportunity in connection with takeover bids" (*Amicus* Brief, p. 14), to permit the imposition of joint and several liability to stand here will achieve the opposite result.

Management of the target corporation is duty bound to inform shareholders of its honest opinion on takeover bids. Management's opinion that the $65 offer was inadequate proved to be factually true. Its opinion that the Grumman transaction was perceived as a better alternative to Chris-Craft is undenied. Nevertheless three members of management are being penalized by being held jointly and severally liable with Bangor Punta which offered shareholders more per share and succeeded in acquiring control more than six months later, by means of alleged securities act violations in which the Piper individuals are not even claimed to have participated. Whatever "well established principles of securities and tort law" may apply to the imposition of joint and several liability, they were not present here.

Such liability will effectively silence management in future contested takeovers to the detriment of shareholders. Management would be foolhardy to seek another contestant if it put itself in the position in which the Piper individuals now find themselves. The shareholders thus will

be deprived of the benefit of a competitive bid for control and will have to accept the first offer made.

Damages

The *amicus* brief disagrees completely with the assessment of damages by the court below. It acknowledges that the question of the proper measure of damages is important to the administration of Section 14(e). Nevertheless it suggests that this Court not grant review of the question at this time for obscure reasons totally ignoring the draconian injustice to three individuals facing bankruptcy if the judgment stands.

These petitions, however, present the Court with the seminal case under Section 14(e) in contested takeover situations. It has before it a complete record and every party usually appearing in such situations, viz. the unsuccessful contestant, members of the target corporation's management, the successful contestant and the advisor and underwriter. Each defendant played a different role in the contest, each was found liable for different alleged violations, each alleged violation contributed differently, if at all, to the outcome of the contest and yet each defendant was found liable to pay the same amount in "damages." That amount admittedly was calculated based upon a presumed rather than a proven injury. The courts, the securities industry and businessmen should not be required to wait another 20 years before this Court renders its definitive opinion on questions of such importance to them as are presented by this case. The injustice of the decisions below to the Piper individuals should not be ignored by this Court.

CONCLUSION

For the reasons stated in the petition, in the reply brief and herein a writ of certiorari should issue.

Respectfully submitted,

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March 4, 1976

Certificate of Service.

I hereby certify that three copies of the foregoing Reply Brief for Petitioners were served by hand this 4th day of March on Arthur L. Liman, Esq., 345 Park Avenue, New York, New York 10022, counsel for Respondent. I further certify that all parties required to be served have been served.

Dated: March 4, 1976.

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